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MOISES GARCIA GUILLEN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MOISES GARCIA GUILLEN, individually and for all those similarly situated,

Plaintiff,

v.

CORNERSTONE FINANCIAL SERVICES; DAVID STONE dba CORNERSTONE FINANCIAL SERVICES; DAVID STONE, an individual; JOHN C BEERY, JR. dba JCB LEASING & FINANCE; JOHN C. BEERY, JR., an individual; and DOES 1 THROUGH 10

Defendants.

Case No. 2:15-cv-09699-RGK-FFM
Judge: R. Gary Klausner

PLAINTIFF'S POSITION REGARDING DEFENDANT'S REQUEST FOR CLARIFICATION AS TO THE COURT'S ORDER ON DEFENDANTS' MOTION TO DISMISS

Complaint Filed: December 17, 2015

Motion Hearing:
Date: February 29, 2016
Time: 9:00 am
Courtroom: 850
255 E. Temple, Los Angeles, CA 90012

Plaintiff agrees that there currently is a difference of opinion between the parties as to the Court's Order on Defendants' Motions to Dismiss. Plaintiff of course do not deny that the Court dismissed Plaintiff's RICO claims. The Court's Order does not specify whether the dismissal is "with" or "without prejudice". Understandably, that distinction is significant in that it directly impacts Plaintiff's options for next steps.

To clarify the point, Plaintiff's counsel did phone the Court's clerk and was informed that unless specifically stated to be "with prejudice" then all dismissals are "without prejudice". As the Order does not indicate with or without prejudice Plaintiff interpreted this to mean that the dismissal is without prejudice. As a courtesy of course Plaintiff's counsel immediately contacted Defendant's counsel to inform him of this information. Defendant's counsel does not agree with this position.

That the Court treats, or at least so Plaintiff's counsel was informed, unspecified Orders of dismissal as "without prejudice" may be to comport with the general philosophy consistent with Rule 15 that amendment should be freely or liberally granted. This is actually consistent with the *Isis Pharm., Inc. v. Santaris Pharma A/S Corp*., No. 3:11-CV-2214-GPC-KSC, 2014 WL 4793029 (S.D. Cal. Sept. 25, 2014) cited by Defendant. The *Isis Pharm*. Court does indeed quote the Fourth Circuit case *McLean v. United States*, 566 F3d 391, 396 (4th Cir. 2009) regarding the issue of with prejudice for unspecific Orders. However the *Isis Pharm.* Court then immediately in the same Order went on to *grant leave to amend*.

Significantly, this Court in its Order does not appear to indicate that amendment would be futile or impossible. Rather, regarding the only two RICO elements to which the Court issue, the Court seems to indicate that amendment may be possible. Regarding the continuity element the Court opined:

> Here, the allegations of continuity are entirely conclusory. Plaintiff alleges that "Defendants specifically represented to Plaintiff's counsel that they

> have been conducting business this way for over 30 years." (Compl. ¶50, ECF No. 1.) Plaintiff, however, does not plead with particularity who made these statements, when they were made, and the context in which they were made. . . . As it stands, the Complaint merely alleges an isolated incident of apparent fraud. In order to sufficiently plead a continuing threat, Plaintiff will need to allege, with particularly, more facts demonstrating that the Defendants were participating in this scheme over a substantial period of time.

Dkt. 36, pp. 13, 14. (emphasis added.) Such information regarding continuity can be provided including without limitation the details of the phone call which as mentioned in Plaintiff's Opposition "took place on March 9, 2015 at 12:53 p.m.—of note the email communication representing that Plaintiff's truck has purportedly been sold to JCB was sent by Cornerstone to Plaintiff's counsel shorty before the call on March 9, 2105 at 10:35 a.m. (See Compl. Exhibit "2")." (Dkt. 27, p. 9, fn. 3.) This phone call was between Plaintiff's counsel Justin Harelik and Cornerstone Financial Services prompted by the letter purportedly indicating that the truck was sold the same day it was repossessed and during which Mr. Harelik was informed that Cornerstone had been conducting its business this way, i.e. repossessing trucks and allegedly selling them the same day for nearly thirty years.

As to proximate cause the Court indicated:

> In the present case, Plaintiff has failed to adequately allege proximate cause. While Defendants' alleged misconduct supposedly prevented Plaintiff from proceeding with his Chapter 13 bankruptcy, it remains to be seen whether, in the absence of such alleged interference, Plaintiff could have successfully structured a reorganization plan and retained his vehicle. As currently pled, Plaintiff's RICO claim suffers from a glaring gap in the causal chain because he has not alleged sufficient facts to demonstrate that

> Defendants' fraud directly caused his loss. Therefore, proximate cause is not satisfied.

Dkt. 36, p. 15. (emphasis added.) However Plaintiff too believes this issue could be amended or clarified to highlight the direct aspect of the proximate cause. Significantly, the load hauling contract that Plaintiff lost was had in fact been executed and was in place as of the date of Defendant's repossession and sham sale of the truck. This contract was referenced in the Complaint and Cornerstone supplied the actual contract in conjunction with its Motion. Under Bankruptcy Code upon filing a petition for bankruptcy a repossessed vehicle become the property of the estate and upon the estate has the immediate right to turnover or return of the vehicle. Plaintiff did make a demand for turnover and since the sale was a sham, actually never occurred then Defendant was supposed to have returned the truck. The sole and exclusive aspect or issue of Plaintiff's Chapter 13 was the reorganization of the truck debt. If Defendant had returned the truck as Defendant was obligated to do so Plaintiff would have had the truck for which he was supposed to fulfill his obligations under the hauling contract which was already in place. The hauling contract would have provided Plaintiff substantial income per month, sufficient enough to pay off the monthly requirements of any Chapter 13 reorganization plan. Indeed the hauling contract was to earn Plaintiff roughly $450,000. However since Defendant did not return the truck under the guise of the sham sale then Plaintiff not only lost his truck and therefore lost the associated hauling contract.

While of course upon amendment Plaintiff would take care to more fully address all of the Court's concerns, given the immediate time constraint of reply to Defendant's papers requesting clarification, Plaintiff believes the above should provide the Court with a fair amount of illumination as to the feasibility of amendment.

Plaintiff respectfully joins in Defendant's request for clarification on the

Court's Order as to Defendants' Motions to Dismiss as to the issue of whether the dismissal of Plaintiff's RICO claims was with prejudice or without prejudice. However, Plaintiff of course would respectfully request that the Order be deemed *without* prejudice and/or without prejudice with leave to amend.

Respectfully Submitted,

DORROS LAW

/s/ Torin A. Dorros

Torin A. Dorros

Attorneys for Plaintiff